111-770

Supreme Court of the United States

OCTOBER TERM, 1883.

NANCY A. EDRINGTON ET AL., APPELLANTS,

vs. } **No. 244.**

J. W. JEFFERSON, TRUSTEE, ET ALS., APPELLEES.

Appeal from the Circuit Court of the United States for Eastern District of Arkansas, at Helena.

BRIEF FOR APPELLEES.

D. E. MYERS.
WM. M. SNEED.

S. C. TOOF & CO. PRS. & LITHS., MEMPHIS

In Supreme Court of the United States.

NANCY A. EDRINGTON ET ALS., APPELLANTS,

vs.

J. W. JEFFERSON, TRUSTEE, ET ALS., APPELLEES.

BRIEF FOR APPELLEES.

Inasmuch as we are not satisfied with the statement of the facts of the case, by counsel for appellants, we beg leave to give statement of the same chronologically as near as may be, and as we understand the record.

About February 6th, 1874, the mercantile firm of Jefferson & Edrington failed, or rather became embarrassed, so that they were unable to meet promptly their liabilities. That firm was composed of James H. Edrington and J. T. Jefferson, and did business in Memphis, Tennessee. One of the partners of the said firm, to-wit: J. H. Edrington, was individually, and as a member of other firms indebted to the firm of Jefferson & Edrington (the failing firm) in the sum of $28,754.21, known on the books of the same as the Edrington & Co. account, $13,127.56, and the C. H. Gaylord & Co. account, of which firm J. H. Edrington was also a member, in the sum of $15,626.65, making the aggregate of $28,784.21. See agreement filed by J. T. Jefferson and J. H. Edrington.

Record 43–51.

Said firm of Jefferson & Edrington being indebted in the aggregate about $45,000, and being desirous of getting an extension on this indebtedness, offered to secure the same to their creditors, provided the extension should be granted. About March 16th, 1874, an extension was granted upon condition that security should be given. Negotiations continued for some time, J. H. Edrington securing the sum of said $28,784 21 of the indebtedness of the firm by trust deed upon the Whitmore and the Fain plantations, which were to be free of all incumbrances except $500 00, which Edrington was to remove.

Crook's Dep., R. p. 588–590.
John W. Jefferson's Dep., R. 599, &c.
J. T. Jefferson's Dep., R. 628.
J. W. Jefferson's Dep., R. 640–642–644.

On March 19th, 1874, the trust deed was prepared and signed, but not acknowledged and delivered until June 6th, 1874, which secured said $28,784.21 to John W. Jefferson as trustee. And notes were executed for the same falling due at various times as shown by the trust deed.

Record pp. 29–32.

This trust deed was executed by James H. Edrington and his wife Nancy A., who is the complainant in this suit, and contains full covenants of warranty.

See trust deed, Record 29 to 39.

The reason of the delay between the date of making and acknowledgment of the deed of trust was to give time to James H. Edrington to remove all incumbrances on the property embraced therein, and to give acceptances for part of the debt.

See contract, R. 43 to 52.

On August 12th, 1874, after the execution of said trust deed, James H. Edrington died, and his wife, Mrs. Nancy A. Edrington, qualified as his executrix in Mississippi county, in the State of Arkansas, and proceeded to the execution of the trust, the defendant John Mathews acting as her agent.

Thus matters stood until about December 2d, 1874, when the notes secured by said trust deed not having been paid, the trustee advertised the plantations for sale in pursuance of the trust, fixing the day of sale on January 21st, 1875.

Record pages 55 and 56.

On December 11th, 1874, the complainant Nancy A. Edrington as executrix of said James H. Edrington, deceased, filed her bill in the Circuit Court of Mississippi county, Arkansas, on the equity side, seeking to and did enjoin the sale of the property under said trust deed, alleging therein the death of James H. Edrington as aforesaid, and that he left surviving him his widow, the said Nancy A. and certain children in the bill named, and that said James H. left a will, and her qualification as executrix thereunder in Mississippi county, in the State of Arkansas, and that she was still acting as such executrix. That the said J. H. Edrington and J. T. Jefferson engaged in business in the city of Memphis under the firm name of Jefferson & Edrington; that sometime previous to the death of James H. he was suffering with a painful bodily disease, which finally terminated in his death. That during this time his partner, J. T. Jefferson, had control of the business of the partnership to a great extent. That also during this time Jefferson managed the business for

his own profit, etc. Also stated the contract heretofore referred to, between J. T. Jefferson and J. H. Edrington, the execution of the trust deed of J. H. Edrington and wife to John W. Jefferson, trustee, to secure payment to the creditors of the said firm of Jefferson & Edrington.

Also alleging a prior incumbrance on the Whitmore place, named in the trust deed, in the shape of a mortgage, to secure one James H. Hazard in the sum of $8000, and furthermore alleging an incumbrance of about $12,000 upon the Fain place prior to the trust deed for unpaid purchase money, and due to John Mathews as assignee of Penelope Fizer for herself and Georgia B. McCauley and Samuel B. McCauley; and that J. T. Jefferson had not paid any of the debts of Jefferson & Edrington since the execution of said trust deed, as he had obligated himself to do in his contract.

Record pages 43 to 52.

And further alleging as follows: "That the said executrix has had the whole business of her testator, including the planting operations upon all his plantations, successfully carried on since his death, and has made notwithstanding the late disastrous season and the making of only half a crop, about *eight hundred bales* of cotton during the past season, at least *four hundred* of which is assets of the estate."

Record page 8.

And claiming that for the ensuing season, if let alone, she could make at least twelve hundred bales of cotton, or sufficient to pay off fully one-half of the entire debt. Which bill alleges fraud in procurement of the trust deed and in various other matters. The injunction was granted.

Record page 65.

On December 22, 1874, the complainant, Nancy A., executrix as aforesaid, filed her amended complaint in said court, making certain allegations against the defendant J. T. Jefferson, in regard to his failure to carry out the contract between him and the late J. H. Edrington, not material to be further noticed here.

Record page 67.

On January 14, 1875, complainant, Nancy A., filed her second amended complaint, setting up certain other arrangements between her late husband and his partner, J. T. Jefferson, pertaining to their partnership, and showing an indemnity bond from J. T. Jefferson to Edrington.

Record page 73.

It will be noticed that neither this nor the former amendment, made any mention as to the allegations in the original bill that John Mathews was the owner of the Hazard and McCauley notes, or that the amount of cotton realized from the estate for the previous year, had for any cause been over-estimated, or that she had become the owner of the Hazard and McCauley notes, claimed to be prior liens to the said trust deed.

On March 1, 1875, John W. Jefferson, trustee, filed his answer to the original and amended bills.

Record page 75.

And on the same day, J. T. Jefferson filed his answer to said amended and supplemental bills.

Record pages 94 to 113.

Both of these answers specifically and particularly denied all the allegations of complainant's bill, except as to the execution of the trust deed and the amount due thereunder.

On March 3, 1875, an order was entered by consent of all the parties who had been served, with the exception of John W. Jefferson and J. T. Jefferson, appointing John Mathews, who was the *agent* of the executrix, as special receiver in the cause, with instructions as to the management of the Fain and Whitmore plantations embraced in said trust deed.

Record page 115.

March 3, 1875, upon motion, the Washington Fire and Marine Insurance Company, the Planters Insurance Company, J. C. Ward & Co., Appleton, Noyes & Co., North American Cotton Tie Company, were made parties defendant, and twenty days allowed to file their answer and cross-bill.

Record page 116.

March 4, 1875, the cause was continued, by consent, to September term, 1875.

Record page 116.

September term, 1875, to-wit, September 7, 1875, the Washington Fire and Marine Insurance Company, and others, were given ninety days further time in which to file their answers and cross-bill.

Record page 121.

September 7, 1875, by order of court, F. Banksmith and others were made parties defendant and given *ninety days* in which to file their answers and cross-bill.

February 28, 1876, the joint and several answers and cross-bill of the defendants, the Washington Insurance Co., the Planters Insurance Co, Appleton, Noyes & Co., J. C. Ward & Co., Taylor Brothers, F. Banksmith, Orgill Broth-

ers, H. Wetter & Co., and other creditors secured by said trust deed of James H. Edrington and wife, were filed, in which the said creditors secured by the trust deed aforesaid denied all charges of fraud; they denied also that John Mathews held the purchase money notes on the Fane place to the extent of $12,000, or that he had bought said notes with his own money, and alleging that if he bought them at all he had bought them as agent of the executrix, the complainant Nancy A. Edrington, with the money belonging to the estate of James H. Edrington, deceased. Denying also that they knew of any fraud alleged in the bill against J. T. Jefferson, or that they knew of any private transaction between J. T. Jefferson and J. H. Edrington, and denying that they had anything to do with that transaction, and denying also that J. H. Edrington during the negotiations with them had any want of business conception in the matters of business under negotiation; denying that J. T. Jefferson procured the trust deed to be made or executed as aforesaid, and denying that they knew anything of any private agreement between said J. H. Edrington and J. T. Jefferson at the time the trust deed was executed to secure their claims, charging that all incumbrances on the Whitmore place and the Fane place had been discharged and paid off by the executrix of said estate. Denying also that the defendant John Mathews was ever a *bona fide* holder of the notes for the purchase money of said Whitmore and Fane plantations, or were ever purchased by him for his own benefit, and alleging that when said notes were taken up they were paid off with money of said estate by the executrix and were discharged, and that the assumed purchase by him of said notes in his own name was an attempted fraud upon the complainants in the cross-bill, who

sought to foreclose the trust deed. Charging further that J. T. Jefferson, one of the partners of Jefferson & Edrington, had paid off about $11,000 of the debts secured by said trust deed since its execution, and denying that they had any connection with their co-defendant, J. T. Jefferson, or that they are bound by any of his acts, and that they know nothing of the accounts between J. T. Jefferson and J. H. Edrington *inter se*. Denying also every and all allegations of fraud and setting out the notes given by Edrington and Edrington & Gaylord as secured by said deed of trust for their benefit, and showing that they had been duly probated and allowed in the Probate Court and giving the amounts for which the firm of Jefferson & Edrington were indebted to each individual defendant and cross-complainant. *Alleging further that at the time of the execution of said trust deed the said J. H. Edrington represented that there was no incumbrance on the Whitmore plantation and that the only incumbrance on the Fain plantation was $7000*, and that the complainant *Nancy A. Edrington also stated and asserted* that all purchase money on the Fane place had been paid off with the exception of one note of $5000; charging also that said notes on the Fane place had both been paid off, and that the executrix, Nancy A. Edrington, and John Mathews, her agent, had found said notes and had fraudulently set them up as liens upon the place, and that the alleged purchase of said claims by John Mathews, in his name, was a shrewdly concocted scheme and an attempt on the part of complainant to defraud the creditors secured by said deed of trust and made in the name of John Mathews as a cloak and cover to conceal the fraud attempted, and that the allegation of John Mathews as to said notes and claim is a part and parcel of the

combination to defraud respondents and the other creditors of Jefferson & Edrington secured by said trust deed. Complainants in cross-bill further charge that at the time it is claimed that the liens and notes against the Whitmore and Fain plantations were bought the complainant Nancy A., as executrix, had in her hands notes, money, assets and property belonging to said estate, more than sufficient to pay off said liens, and that the assets of said estate were used either directly or indirectly to pay off both the Hazard and McCauley and Fizer mortgages, and that the whole scheme and story in regard to the purchase of the Hazard and McCauley mortgages was a fraud upon the creditors secured by said trust deed and were paid off, in fact, out of the monies belonging to the said estate.

Said cross-bill also charging fraud against defendant John Mathews as special receiver in the cause and agent of Mrs. Edrington, in regard to his management of the Fain and Whitmore plantations as such special receiver, and praying an injunction restraining him from attempting to further rent or manage said places. It also prayed for the *foreclosure of the trust deed*, making a great many parties defendants, some residents and some non-residents, among them *Mrs. Penelope Fizer, individually and as guardian, and Samuel B. McCauley, parties defendant*, in order to formally divest the legal title out of them; and among other things praying for general relief.

Record pages 137 to 210.

Service was had upon a few of the defendants, but *no* warning order or *publication* was made as to the remaining defendants. The restraining order to John Mathews was granted.

Record pages 135 and 136.

May 9th, 1876, *May term, 1876*, defendants J. W. Gaff & Co. filed their answer.

Record page 239.

May 9th, 1876, defendant John Mathews filed his answer to cross-bill, admitting the execution of the trust deed, denies on *information* that at the execution of the trust deed Edrington represented that all the purchase money of the Fain place except $5000 had been paid, alleging that he purchased the two McCauley notes for $5000 with his own money, and denies that he purchased them as agent for Nancy A. Edrington, or with her money, sets up the purchase of the Hazard notes and mortgage for Mrs. Nancy A. Edrington individually and with her own money, alleging that he afterwards sold the McCauley notes to Mrs. Edrington, and denying that, at the time of the purchase of the McCauley and Hazard notes, the executrix had assets of the estate and money sufficient to pay them off, and stating many other things therein, nearly all of which afterwards proved to be wholly untrue.

Record pages 243 to 256.

May 10, 1876, defendant George E. Cook filed his answer.

Record page 399.

May 10, 1876, Mrs. Edrington individually and as guardian of her minor children, filed her answer to the cross-bill, alleging that she purchased the McCauley notes and the Hazard notes with her own money and for herself individually, and in the same adopted the answer of her co-defendant and agent, John Mathews.

Record pages 401 to 403.

July 18, 1876, the answer of John W. Jefferson, trustee, to cross-bill was filed.

Record page 436.

And the answer of Woodruff & Co. to cross-bill was filed the same day.

Record page 439.

(NOTE.—Up to this time, no service had ever been had upon defendants S. B. McCauley and Penelope Fizer, nor publication made as to them.)

November 6, 1876, *at the November term, 1876*, the defendant S. B. McCauley filed his answer to the cros-bill, alleging that about February 3, 1874, he for himself, and as agent for his mother, Penelope Fizer, late McCauley, and his sister, Georgia B. McCauley, sold and transferred the notes in Memphis, Tennessee, at the house of Brooks, Neely & Co., to John Mathews, in the presence of Mr. J. C. Neely and John C. Palmer, (the latter being the attorney for Mrs. Edrington, as executrix,) and that he was paid for them through the house of Brooks, Neely & Co.

Record page 442.

November 13, 1876, Brooks, Neely & Co. filed their petition and complaint in the cause, alleging, among other things, the transfer of the notes by the McCauleys on November 3, 1874, to John Mathews, and on February 23, 1875, the transfer by John Mathews to Mrs. Edrington; alleging that she held the legal title to them; alleging that they furnished the money to take up the said notes, and that they held one of them still as collateral security for that money, (which is untrue,) and that they, Brooks, Neely & Co., now hold both of said McCauley notes by virtue of

the trust deed from Mrs. Edrington to them, asking a foreclosure and sale under the provisions of the title bond from McCauley to Edrington, asking that their claim be considered as a cross-complaint in the cause, and also make Miss Georgia B. McCauley a party defendant.

Record pages 742 to 758.

(NOTE.—It will be noticed that John C. Palmer, Esq., who is the attorney of the estate of Edrington and the executrix, Nancy A. Edrington, filed this complaint also for Brooks, Neely & Co.)

Record page 748.

November 13, 1876, *at the November term 1876*, James D. Driver was made defendant, and files his cross-complaint setting up that he was the holder of the Hazard note of $8000, under the contract of Nancy A. Edrington, to secure him in a debt of $3000, which contract appears upon its face to have been executed February 8, 1876, and asking that it be declared a prior lien on the said Whitmore place, and that after paying him the amount due, the residue should be paid over to Nancy A. Edrington.

Record pages 774 to 785.

(NOTE.—It is worthy of notice that John C. Palmer, Esq., attorney for Mrs. Edrington and the estate, also files complaint for J. D. Driver.)

November 13, 1876, order of publication for Miss Georgia B. McCauley.

Record page 780.

November 14, 1876, complainant Nancy A. Edrington files another amendment to her original bill, alleging that the Washington Fire and Marine Insurance Company was

never chartered, and they had no power or authority to contract with James H. Edrington, and alleging usury in the contract (both allegations being false.)

Record page 780.

November 15, 1876, cross-complaint amended by making Miss Georgia B. McCauley a defendant.

Record page 808.

November 15, 1876, by order of court, John W. Jefferson, trustee in the trust deed aforesaid, who was the original defendant in the cross-bill, was changed and made a complainant to said cross-bill as though he had originally been so.

Record page 812.

November 15, 1876, upon motion of complainants in the cross-bill, it was dismissed as to all the defendants therein except Nancy A. Edrington individually and as executrix of the estate of James H. Edrington, deceased, and William B. Edrington, John P. Edrington, James H. Edrington, Joseph C. Edrington, Eugenia Edrington, minor children and heirs-at-law of said James H. and Nancy A. Edrington, and John Mathews, Emily Hazard and John Hazard, S. B. McCauley, Penelope Fizer individually and as guardian of Georgia B. McCauley, and Georgia B. McCauley, George E. Cook and C. H. Gaylord, all of which remaining defendants were residents of the State of Arkansas, with the exception of George E. Cook, who was a resident of Kentucky, and had no real interest in the controversy, and S. B. McCauley, Penelope Fizer and Georgia B. McCauley, residents of Tennessee, who had no *real* interest in the controversy, but made parties for the sole

purpose of divesting the naked legal title to the Fain place out of them.

Record pages 813 to 814.

November 16th, 1876, *November term, 1876*, complainants in the cross-bill filed their petition for removal of the cause from Mississippi county to the Circuit Court of the United States for the Western District of Arkansas at Helena.

Record page 823.

And the same day and the same time they presented their bond for removal, which was duly approved and accepted, and the cause removed.

Record page 829.

March 14th, 1877, in the United States Court, the complainants in cross-bill were allowed further time in which to file their answer to the cross-complaint of Brooks, Neely & Co. and James D. Driver.

Record 968.

June, 1877, the answer of the Washington Insurance Co. and others to cross-complaint of Brooks, Neely & Co. was filed, averring among other things that only one of the McCauley notes remained unpaid after the death of J. H. Edrington, denying that John Mathews held either of said notes for himself, alleging that at the time John Mathews was the agent of Nancy A. Edrington and the estate, and that the pretended purchase in his name was a subterfuge, &c.; also averring that at the time of the pretended purchase of said notes, December, 1874, and January, 1875, Nancy A. Edrington, as executrix, had in her hands a large amount of money belonging to the estate, some thirty or forty thousand dollars, and that in fact, said notes were

paid and taken up with money in her hands belonging to said estate, and that the transaction amounted to an extinguishment of the claims. They deny that Brooks, Neely & Co. held either of said notes from December, 1874, or January, 1875, as collaterals for money advanced to take them up, and that they had both been paid for and discharged by the funds of the estate of J. H. Edrington long before April 13, 1875, the date of their trust deed, all of which was known to Brooks, Neely & Co. They deny that Brooks, Neely & Co. are in any sense innocent purchasers, but must stand in the shoes of the executrix. They deny that Nancy A. owes them anything on any account, either as executrix or individually, in fact, denying every material allegation in the cross-complaint.

Record pages 966 to 985.

March 14, 1877, answers and demurrers of the Washington Insurance Company to the amended bill of complainants filed November 14, 1876.

Record pages 988 to 998.

March 13, 1877, *March term, 1877*, complainants filed motion to remand the said cause to State courts.

Record pages 1000 and 1001.

March 16th, 1877, *at same term*, upon application of counsel for both complainants and defendants, an order was made for personal service in Tennessee on the defendants Georgia B. McCauley and Penelope Fizer.

Record 1001 and 1002.

October 10th, 1877, *October term, 1877*, counsel for complainants in original bill got leave to file additional causes to remand.

Record 1003 and 1004.

October 11th, 1877, an order was entered overruling the motion to remand and appointing John C. Palmer guardian *ad litem* for the defendant Georgia B. McCauley, she having been duly served, and on the same day answer of guardian *ad litem* filed.

Record 1005, 1006 and 1007.

March 17th, 1879, *March term, 1879*, ruling on exceptions to the final report of John Mathews, special receiver, and judgment against him for $5675, balance in his hands as such receiver, and order on him to pay into court. Prayer for appeal from the same which was never perfected.

Record 1010 to 1012.

October 4, 1879, *October term, 1879*, a final decree was entered in the cause ordering sale under the trust deed from Edrington to Jefferson as aforesaid of the Fain and Whitmore plantations for the benefit of the beneficiaries thereunder, and finding the balance due to each and decreeing a distribution of proceeds *pro rata* among them all, adjudging that the said McCauley and Hazard notes had been paid off and no longer constituted encumbrances on said lands, and that purchasers should take fee simple title, etc. From which decree Nancy A. Edrington individually and as executrix, Brooks, Neely & Co., and James D. Driver, prayed an appeal to the Supreme Court, but it was not perfected at the time.

Record 1014 to 1022.

January 3, 1880, order in vacation allowing the master to receive from the purchasers of the lands to be sold in former decree the receipts of complainants in the cross-bill to whom the proceeds of the sale belong, to the extent of their distributive shares. Record 1023.

March 8, 1880, *March term, 1880*, order confirming the report of sale by the master, of January 13, 1880, showing the purchase of the lands in controversy by J. J. McComb and J. W. Jefferson (*not the J. W. Jefferson who was trustee*) for the sum of $26,525, and showing a compliance by them, that being the amount of beneficiaries under the trust deed and decree, and also showing a distribution of the funds, both in court and arising from the sale. The same day also the court confirmed the deed of the commissioner to said J. J. McComb and J. W. Jefferson divesting all the right, title and interest in said land out of all the parties to the suit and vested it in the purchasers.

Record 1024 to 1034.

After all this had been done, on March 9, 1880, John B. Driver, administrator de bonis non of James H. Edrington, and one John H. Sheddin, claiming to be a general creditor of said estate, by their solicitors John C. Palmer and W. M. Rose, Esqs., moved the court for leave to file a petition of intervention in the cause.

Record 1035.

Which, without any authority as it seems from the record, was filed by the clerk, and the petition seems to have been sworn to by John C. Palmer, Esq., attorney, on *19th* of March, 1880.

Record 1035 to 1041.

Which petition alleges, in short, that said John B. Driver was appointed administrator *d. bonis non* of James H. Edrington, deceased, in Mississippi county, Ark., on the 6th day of January, 1880; that unsecured claims in the sum of about $76,000 had been allowed against said estate, including $1199.19 owing to petitioner Sheddin. (NOTE.—

Which, however, is not true, the exhibit to the petition showing that the secured and unsecured claims of said estate including all those in the trust deed heretofore foreclosed, only amonnted to $76,013.) That January 28, 1880, Nancy A. Edrington, as former executrix, filed her final settlement in probate court, which showed the estate indebted to her $28,973.35; that Nancy A. Edrington, former executrix, had paid out of the general assets of the estate, in taking up and extinguishing the two McCauley notes, the sum of $10,000, and also $8000 in the extinguishment of the Hazard mortgage and note, and praying to be allowed to intervene and claim the purchase money of the Fain and Whitmore plantations for the general creditors, on the ground that the incumbrances thereon to the extent of about eighteen or twenty thousand dollars, had been liquidated by the former executrix of the estate out of the general assets. (NOTE.—It looks a little peculiar that this petition for intervention should have been filed and sworn to by John C. Palmer, Esq., who had represented the executrix of the estate all through the litigation, claiming that she had purchased the McCauley and Hazard notes with her individual means and held them against the estate and lands.)

March 10, 1880, the Washington Fire and Marine Insurance Company, and other complainants in the cross-bill, filed their motion to strike said petition for intervention of Driver and Sheddin from the files of the court for various reasons set out therein.

Record page 1053.

March 11, 1880, a motion to strike the said petition of John B. Driver and Sheddin from the files, was sustained. From which order the petitioner John B. Driver, and John

Sheddin, one of the creditors, prayed an appeal, which was granted.

Record page 1056.

A great portion of the record relates to the receivership of John Mathews and motions against him not involved in this appeal, but inasmuch as he was the agent of the executrix Mrs. Edrington and a prominent witness for her in this cause, a reference to his final report and balance (Record pp. 258, 567.) and the exceptions thereto, (Record pp. 411 to 415 and 832.) and decree on the exceptions, and judgment against him for $5675, (Record pp. 1010–1012.) will be instructive as showing the entire untrustworthiness of the man.

ARGUMENT.

I.

The first inquiry is, was the case properly removed from the State court, or did the court err in refusing to remand? and we submit that the removal was proper and the refusal to remand in accordance with the law and practice, under the act of Congress, approved March 3, 1875. 18 Stats. at Large, p. 449. Under the above act we concede that the application for removal should be made "before or at the term at which said cause could be first tried and before the trial thereof." That is, at or before the first term, when the cause is ready for trial or triable under the pleadings and practice of the particular State court, on its merits, or in other words, as we understand the rule, *at or before the first term under the State of the record*, when under the State practice either party could have properly demanded as of right a trial on the merits. Now, with this rule before us, let us examine: 1st. The law of the State of Arkansas governing the terms of the Circuit Court in Mississippi county, and the practice governing cases on the equity side of that court, and 2d, the state of the record and condition of the cause, from the time the original bill was filed until November 16, 1876, the date of removal. *First*, under article 18 of the constitution of Arkansas, 1874, the terms of court in Mississippi county were fixed on the first Mondays in March and September. By act of the Legislature, approved December 14, 1875, the terms were so changed as to begin on "the thirteenth Mondays after the first Mondays in February and August of each year."

Acts of Ark. 1875, ch. 60, p. 141.

In other words, this changed the terms to *May* and *November* of each year."

The statutes of Arkansas governing the process, preparation and time of trial in equity causes, which we deem pertinent, are found in Gantt's Digest of Arkansas statutes, and are as follows:

Sec. 4584. In an action prosecuted by equitable proceedings, the defense must be filed on the third day of the term: First. Where the summons has been served twenty days before the commencement of the term, in the county in which the action is brought, or an adjoining county. Second. Where it has been served thirty days elsewhere in the State, or sixty days out of the State; or, Third. Where the defendant has been constructively summoned thirty days."

PERSONAL SERVICE

Is made on residents by the sheriff, coroner or officer to whom the writ is directed, etc.

Gantt's Digest sec. 4511.

"By delivering the defendant a copy of the summons," etc. Sec. 4512.

Where the defendant is out of the State, actual service can be made by service of copy of complaint with summons annexed and delivering the same to him. Proof of delivery to be made by affidavit of the party making it, etc., and a certified copy of summons with affidavit and certificate to be returned and filed.

Gantt's Digest secs. 4525–4526.

CONSTRUCTIVE SERVICE.

"Where it appears by the affidavit of the plaintiff in the clerk's office, at or after the commencement of the action, that the defendant is *a non-resident* of this State" * * * warning orders may be made.

Gantt's Digest sec. 4527.

Sec. 4528. "The court may make the warning order upon the requisite facts being shown by affidavit or proof. Warning orders shall be published weekly for at least four weeks."

See also, Gantt's Digest secs. 4031, 4037.

Sec. 4585. "Where the service of the summons was before the commencement of the term, but not the length of time mentioned in the last section, the defense shall be filed in thirty days after the service."

Sec. 4586. "If the answer in equitable proceedings contains a counter-claim or set-off, the *plaintiff shall reply* within twenty days after the answer is filed, or ninety days before the ensuing term."

Sec. 4587. "The court may for good cause shown, *extend* the time for filing an answer or reply to some subsequent day in *that* or the *next* succeeding term."

Sec. 4660. "On the third day of each term the court shall call all cases on the equity docket in which the summons has been served as provided in section 4584, and upon failure to defend may give judgment."

Sec. 4664. "Actions prosecuted by equitable proceedings shall stand for trial at any term where the pleadings have been, or by the provisions of sections 4584, 4585 and

4586, should have been *completed ninety days before* the commencement of the term. *But where they have not been so completed, though they should have been by those sections, the party in default, as to time, shall not be entitled to demand a trial.*"

Sec. 4667. "Where the summons in an action by equitable proceedings has been served in due time on *part only* of the defendants, the plaintiff may dismiss his action as to those not summoned, and proceed to trial as to the others in all cases, where he could have maintained his action against them without joining those not summoned."

Sec. 4666. "*The plaintiff* shall be entitled to a trial by equitable proceeding at the first term *after the summons has been served on all the defendants*, as provided in Sec. 4584, where *no* issue of fact is made by the pleadings, or where the plaintiff consents that the statements of the answer may be taken as true."

Sec. 4559. "A defendant may file a cross-complaint against any persons other than the plaintiff, and have proceedings thereon as follows:

"*First.*—Where a defendant has a cause of action against a co-defendant or a person not a party to the action, and affecting the subject matter of the action, he may make his answer a cross-complaint against the co-defendant or other person."

Second.—"The defendant to such cross-complaint may be actually or constructively summoned, and defense thereto shall be made in the time and manner prescribed in regard to the original complaint, and with the same rights of obtaining provisional remedies applicable to the case."

A.

Under the foregoing rules we submit that the cause *never* was in a condition where it could have been tried at any term from the date the original bill was filed up to the date of removal. It will be seen that the terms of court, after original bill was filed, were as follows: *March, 1875, September, 1875, May, 1876, November, 1876*, at which last term the cause was removed.

Now, let us see how the record stood: December 11, 1874, the original bill was filed.

Record 1 to 14.

December 22, 1874, complainants filed an amended bill.

Record 67.

January 14, 1875, complainants filed a second amended bill.

Record 71.

To which J. T. Jefferson, J. W. Jefferson and G. W. L. Crook, residents of the State of Tennessee, were made defendants with others. *Personal service* was *not* had on any of these non-resident defendants, *nor was any warning order* or *publication made* to bring them in constructively as required by law. But on March 1, 1875, *at the March term*, 1875, two of the non-resident defendants, J. W. Jefferson, trustee, and J. T. Jefferson, appeared voluntarily and filed their answers.

Record 75, 94 and 114.

Two days afterwards, March 3, 1875, upon motion, the Washington Insurance Company, Planters' Insurance Company, Appleton, Noyes & Co., and others, were made

parties defendant, with leave to file answers and cross-bills in vacation, and twenty days time was given them for that purpose. So it is clear said cause could not have been tried at the March term, 1875.

Record 116.

At the September term, 1875, to-wit, September 7th, upon motion, F. Banksmith & Co. and Taylor Bros. were made parties defendant and allowed *ninety* days in which to file their answers and cross-bill.

On the same day, for sufficient reasons, the Washington Fire and Marine Insurance Company and other defendants were allowed ninety days additional time within which to file their answers and cross-bill.

Record page 121.

And *no service, either actual or constructive*, was up to this time shown to have been had upon the defendants to the original bill, Emily R. Hazard and John W. Hazard, nor had they voluntarily appeared. So it seems plain that the cause could not have been tried under the rules of law and state of the record at the September term, 1875. The next term was May, 1876.

February 28, 1876, the joint and several answers and cross-complaint of the defendants the Washington Insurance Company, Planters Insurance Company and other defendants was filed, making many defendants; among them Penelope Fizer and S. B. McCauley and several other non-resident defendants.

Record page 138.

(NOTE.—*No service* was had upon any of the non-resident defendants to this cross-bill, either actual or constructive, and no warning order or publication made.)

But at the May term, 1876, thereafter, G. W. Gaff & Co., John Mathews and J. W. Jefferson, trustee, appeared and severally filed answers to the cross-complaints.

Record pages 239, 243, 339, 401.

And up to this time *no summons or process had been served upon* the defendants S. B. McCauley and Penelope Fizer and several others; so we submit that the case was in no condition where it could have been tried at the May term, 1876.

Again, on November 6, 1876, at the *November term*, 1876, the defendant S. B. McCauley filed his answer to the cross-bill. Record page 441.

On November 13, 1876, Brooks, Neely & Co. petitioned to be made defendants and filed their petition as a cross-complaint.

Record page 742.

And on the same day James D. Driver filed his petition and cross-complaint.

Record page 774.

Both the last named cross-complaints making various parties defendant thereto.

November 13, 1876, *order of publication was made for defendant* Miss Georgia B. McCauley.

Record page 789.

November 14, 1876, *complainants* in the original bill filed their third amendment thereto.

Record page 783.

November 15, 1876, complainants in the cross-bill amended by making new parties.

Record pages 808 and 812.

And on the same day John W. Jefferson, trustee, was made complainant.

Record page 811.

And on November 16, 1876, all at the same term, the complainants in the cross-bill filed their petition and bond for removal to the Circuit Court of the United States.

No process and summons had issued yet upon the various new amendments. Hence we submit, that, removal was had certainly "at the first term at which the cause, as a cause, could have been tried," and it is equally clear, that it could not have been tried at that term, and the removal was proper.

And this is so under—

Babbitt v. Clarke, 103 U. S. 606.

But see—

C.

AND THE CITIZENSHIP OF THE PARTIES ALSO JUSTIFIED THE REMOVAL.

The defendants to the original bill — John Mathews, Emily R. and John Hazard — who were residents of Arkansas, were merely nominal parties, having no real interest in the controversy, as the bill shows. The *real* defendant was John W. Jefferson, trustee, a citizen of Tennessee: and the others, afterward made defendants the beneficiaries under the trust, who were all citizens of Tennessee, Missouri and Ohio.

The defendants, who were complainants in the cross-bill after J. W. Jefferson, trustee, was dismissed as a defendant and made a complainant therein, who had any interest, were all citizens of Tennessee, Ohio and Missouri. See cross-bill, Record page 138. After the order of dismissal as to parties of November 15, 1876, (Record page 813) it left as sole defendants to the *cross-bill* Nancy A. Edrington individually and as executrix of J. H. Edrington and her *minor* children, W. B., John P., James H., Joseph C., Eugenia and Irene Edrington, Emily Hazard and John Hazard, John Mathows, C. H. Gaylord, *all citizens of the State of Arkansas*, George E. Cooke, a citizen of Kentucky, and Penelope Fizer, Samuel B. and Georgia B. McCauley—the last three citizens of Tennessee, *but having no real interest* in the controversy, as they had transferred the McCauley notes on the *Fizer* place to *Nancy A. Edrington*. But it is asserted in brief of adversary counsel that the children (heirs) of J. H. Edrington were citizens of Tennessee. This proposition we controvert because:

First, Mrs. Edrington, their *mother*, was a citizen and resident of Arkansas and executrix of their father's estate in Arkansas. (She could not have held that office unless she had been.)

And second, the children were all minors, according to her own allegation.

See original bill, R. page 1.

Mrs. Edrington was also guardian for those minor children in Arkansas, and *answered* for them as such.

Record page 101.

Hence, it made no difference whether these minor Edrington children were absent from Arkansas, at school or

otherwise. *The citizenship, residence and domicil of the mother and guardian drew to it that of the children, and fixed their citizenship in Arkansas.*

Wooldridge v. McKenna, 8 Federal R., 650–681.

Ross v. Ross, 129 Mass. 243.

Allen v. Thomason, 11 Hum. 535.

11 Cent. Law J. 421, 12 Id. 51.

Story Conflict Laws (5th Ed.) § 46 and § 506, with note 1.

Schouler's Dom. Rels., pages 312, 412, 367, 368 and 369.

Wharton Conflict Laws (2d Ed.) § 11 and § 54.

D.

Now, let us see how the parties stood at date of removal. *All* the complainants in the cross-bill to foreclose the trust deed of Edrington and wife to Jefferson, trustee, are citizens of Tennessee, Missouri and Ohio.

The complainant Nancy A. Edrington, in original bill, claims to have bought and to be the owner of, in her own right, the lien notes of McCauley on the Fain place, and the Hazard note, claimed to be a lien on the Whitmore place by assignment and purchase from the McCauleys and Hazard.

The complainants in cross-bill claim that all of said notes, claimed to be prior liens to the Edrington trust deed, were not the property of Nancy A., but had been paid off and discharged with the money belonging to the estate of J. H. Edrington, deceased; hence, she held no prior lien by virtue of said notes, the same having been paid off and discharged and extinguished, and that she

had no claim thereto, but on the contrary, that they were extinguished and no lien, it being admitted on both sides that the said prior lien notes had been paid off and discharged, so far as the original holders, McCauley and Hazard, were concerned, by said Nancy A., *and that neither* S. B. McCauley, Penelope Fizer or Georgia B. McCauley, had any further *real* beneficial interest in said notes; and that the Hazards had no further interest in fact except the naked legal title.

Again, let us arrange the parties so far as the foreclosure of the trust deed of Edrington to J. W. Jefferson is concerned, and see how the necessary parties stand in the controversy:

First.—All the complainants are citizens of Tennessee, Missouri and Ohio.

Second.—All the necessary defendants, so far as the foreclosure of the trust-deed set out in the cross-bill of the Washington Ins. Co. and others, are Mrs. Edrington, as executrix and individually, and as guardian, and the children and heirs-at-law of James H. Edrington, deceased, all of whom, as before shown, were citizens of the State of Arkansas. So here we have a controversy, "which is wholly between citizens of different States, and which can be wholly determined as between them," and which is properly removable.

But it is claimed that complainants in the cross-bill and Brooks, Neely & Co. and J. D. Driver each seek to foreclose the same trust deed or trust arising from a single instrument. Of course such position is *erroneous*, because Brooks, Neely & Co. seek to foreclose a lien under a title bond executed by McCauley to Edrington (see answer of Brooks,

Neely & Co.), and J. D. Driver seeks to foreclose a mortgage executed by Edrington in his lifetime to the *Hazards*, and complainants in cross-bill seek to foreclose a trust deed from J. H. Edrington and wife, Nancy A., to J. W. Jefferson, trustee, to secure an entirely different debt, so the whole matter is divisible and *separable*, and different causes of action against different parties, as in

Barney v. Latham, 103 U. S. 205.

Removal Causes, 100 U. S. 457.

But it is claimed by adversary counsel that Brooks, Neely & Co. and James D. Driver and complainants in the trust deed all seek to foreclose the same trust deed. This proposition is palpably erroneous from the record. They each have different and distinct causes of action, as shown by the record.

Again, the notes are claimed to have been purchased and held by complainant in original bill and defendant in cross-bill, Nancy A. Edrington. Brooks, Neely & Co. claim to have taken the two McCauley notes—long after due, to-wit: April, 1875—as collateral for a future debt to be made (Record page 742) and while the present suit was pending, and J. D. Driver claims to have taken the Hazard notes as collateral—long after due and while this suit was pending, to-wit: *February 8, 1876*—long after it had commenced.

Record page 774. Story's Eq. Pl. § 11

So we submit that the claim of *Brooks, Neely & Co.*, even if they had any claim against defendant Nancy A., which we deny, simply stood in her shoes as to said notes and must stand or fall on her claim; they could, under the record, acquire no higher rights than she to the McCauley

notes, and their presence was not necessary in the suit to determine the issue; their claim could only be worked out through her. If she failed, it settled their rights; if she won, they (if they had any claim) won; their presence added nothing to their chances, and the same is true of Driver and the Hazard note. They were as a fifth wheel to a wagon. *The controversy was solely with Nancy A. Edrington* as to these McCauley and Hazard notes, and with her and children as to foreclosure of trust deed described in cross-bill, and this controversy could have been settled without the presence of the other parties.

Story Eq. Pl. S-c. 96.

S. B. McCauley, Penelope Pizer and Georgia B. McCauley are only nominal parties. According to the original bill as well as cross-bill they had no beneficial interest. They had parted with it to Mrs. Edrington long before the suit.

Adversary counsel on page 9 of their brief have misapprehended the facts of the record by a large majority, and, of course, the authorities cited do not apply to the case at bar.

And furthermore, we submit that it is apparent that the pretended claims of both Brooks, Neely & Co. and J. D. Driver are fraudulent in fact.

The citation of authorities on page 10 of brief of U. M. Rose, Esq., was evidently made under a misapprehension of the facts in the record and do not aid him.

II.

The second error assigned by appellants is to the action of the court in *holding* that the two McCauley notes for part purchase money of the Fain place, and the note to

Hazard, secured by mortgage on the Whitmore place, had been paid off and discharged by the executrix, out of the funds of the estate, and constituted no further lien on said places.

This claimed *error* was assigned under a misapprehension of the *indisputable* facts in the record. And this is evident from the statement of adversary counsel, on page 10 of their brief, (Rose) to the effect that "all the witnesses are agreed that Mrs. Eldrington bought the incumbrances in question (the McCauley and Hazard notes) with her own money," etc., and that there is no conflict upon this point. We submit that the result of the proof in the record is in direct opposition to the proposition of counsel for appellants.

It is true that the witness John Mathews, who was the agent of the executrix, so swears in some parts of his deposition, and that J. C. Neely in some places dogmatically states the same thing as to part of said claims, *but the* court will see from the record that John Mathews, with all his direct swearing, dodging and circumlocution, is *utterly* broken down on cross-examination by the exhibits to Neely's deposition by *Gaylord, Lanier* and the other evidence, and is *unworthy of belief* in this cause.

And the assertion of J. C. Neely on this point *is utterly destroyed by his cross-examination* and the exhibit of the accounts from his own books and other physical facts.

The testimony of J. C. Palmer, Esq., is not of knowledge except as to deposit of a draft, which has been accounted for. Meux and Garth only testify as to insurance money collected. They know nothing of the points at issue.

We further *submit* that few records ever presented *more fraud, concealment, misrepresentation* and effort to swallow up an entire large estate by an executrix and her *agent*, to the detriment of creditors, than this; and now having said this much, we confidently submit that the following propositions of fact are clearly established by the proof:

FIRST, *That both of the McCauley notes were actually taken up by the executrix with the money belonging to the estate of Edrington*; and, SECOND, *that the Hazard note was taken up by the executrix with the money of the estate, and if she in the first instance paid her own money for the Hazard note it was merely as a blind, because at the time she claims to have taken it up she had in her hands money of the estate largely more than sufficient to pay it off, which money she appropriated to her own use and never accounted for in any way as executrix.*

We shall, for convenience, discuss both propositions together.

A.

J. H. Edrington died August 12, 1874. At that time he had a large cotton and corn crop in Mississippi county, Arkansas, already laid by. (Record 1175.) That crop was raised on the share plan, Edrington furnishing the land, mules and farming implements and the croppers furnishing *all the labor*, landlord and tenant each to have one-half of crop. (Mathews' Dep., Record 1212.) *The tenant, out of his half of crop, was to pay for all advances made to him by the landlord (Edrington) to enable him to make the crop.*

John Mathews' dep., Record 1225, 1230, 1232, 1238.
C. H. Gaylord's dep., Record 1074, 1075, 1076, 1079.

Up to time of Edrington's death he had procured sup-

plies from Brooks, Neely & Co., and from that source had evidently advanced to said croppers $8473.10.

J. C. Neely's first dep., Record 676.

Gaylord's dep., Record 1078, 1079 to 1088.

In addition to the supplies direct from Brooks, Neely & Co. above, Edrington had furnished to croppers to make and gather crop of 1874,

Through Gaylord	$ 9,333 59
Besides separate accounts of Scott & Gibbs, say,	834 00
Total from Gaylord store	10,167 59
Add Brooks, Neely account up to Aug. 15, 1874	8,473 10
Total due by croppers	$18,630 69

for 1874, that we know of, furnished through Brooks, Neely & Co., and C. H. Gaylord, *which in round figures amounted to the whole interest of the croppers in that crop, which left the proceeds of whole crop of 1874 to the estate.*

The claim for supplies against croppers was all collected by the agent of the executrix by deducting it from their part of proceeds of crop.

See Mathews' deposition, R. 1229.

Not one dollar of the above supplies was paid for by the executrix out of that crop or otherwise. She paid Gaylord nothing.

Gaylord's dep. 1073 to 1088.

Nor Brooks, Neely & Co., for that account was nearly liquidated by Edrington in his lifetime, and nothing paid by Nancy A.

Neely's 1st Dep., R. 677, 678.

Now, this cotton crop of James H. Edrington for 1874, so far as we can ascertain, was all shipped to the house of Brooks, Neely & Co., Memphis. The first shipment was September 15, 1874; the last on April 1, 1875. The gross proceeds of that crop was $45,482.27; the net proceeds after deducting all expenses of selling and freight was $42,621.59. It was all placed to credit of the account of Nancy A. Edrington, executrix of James H. Edrington, deceased, on their books. On November 1, 1874, there was to the credit of that account from proceeds of cotton $16,037.92; on December 1, 1874, $28,119.98; on January 1, 1875, $39,875.59; on February 1, 1875, $38,039.50; on March 1, 1875, $40,091.72; on April 13, 1875, and after all the crop had been disposed of, $42,621.59.

J. C. Neely's First Dep., Record 673 to 676.
J. C. Neely's Second Dep., Record 1198.

Again, the entire credit items on the account of Nancy A. Edrington, executrix, with Brooks, Neely & Co., was $47,055.64; all these credits, with the exception of $5034.05, of date January 16, 1875, was the proceeds of the Edrington cotton crop of 1874.

J. C. Neely's Second Deposition, Record 1011.

It was understood by J. C. Neely at the time Mathews claims to have bought the McCauley notes, November 4, 1874, that the transaction was really for the benefit of Mrs. Edrington. Mathews gave his thirty day note of that date for $5000, to take up the first McCauley note. On January 4, 1875, Mrs. Nancy A. Edrington, executrix, gave her draft on Brooks, Neely & Co. to take up the said John Mathews note, which was in payment of the first McCau-

ley note. So *in fact, John Mathews never paid a dollar on the purchase* of those notes.

See J. C. Neely's Sec. Dep., Record 1007 and 1008.

Again, on January 4, 1875, the first McCauley note was paid by draft of Nancy A. Edrington, executrix, and charged to her account as executrix on the books of Brooks, Neely & Co. And on February 3, 1875, she paid the second McCauley note through the house of Brooks, Neely & Co., $6041.66, which was charged to the debit of her executrix account. So, in fact, both of the McCauley notes were paid through Brooks, Neely & Co., and charged to the account of Nancy A. Edrington, executrix, and the above debts paid out of the funds of the estate. *About this there can be no question.*

J. C. Neely's Sec. Dep., Record pp. 1106 and 1115.
Also, see Exhibit to said Deposition, Record p. 1149,

which gives the items as charged on their books of cash against that account. But it is claimed that on January 16, 1875, Mrs. Nancy A. Edrington deposited with the firm of Brooks, Neely & Co. a check on the Southern Life Insurance Company for $5034.95, which was her individual money, (and the only money which ever went to the credit of that account, except the proceeds of the cotton crop of 1874,) and further, it is argued that the first McCauley note was paid by that credit. But turning again to the exhibit to deposition of J. C. Neely, Record p. 1149, we find that on January 15, 1874, a cash item of $4992.50 charged to her account as executrix, and pursuing this inquiry a little further, we find from a certified copy of *her sworn answer* in the case of Coward against Nancy A. Edrington, executrix, and others, in the chancery court of Shelby county, that

she avers that on January 15, 1875, she paid the balance of two notes on her individual property in Tennessee, amounting to $799.50, the precise amount and on the precise date of the above charge against her as executrix, in the account of Brooks, Neely & Co. So, putting these together, without explanation when challenged to it, we submit that it is conclusive that the proceeds of the check on the Southern Life Insurance Co., deposited as aforesaid, was all but a few dollars, exhausted in the payment of this other amount on her individual property.

See her answer in said cause, Record p. 1316.

Besides this, we find that the executrix, including the three items aforesaid, had drawn over $7,000 in cash against that executrix account.

See "Exhibit B" to J. C. Neely's second deposition, Record pp. 1147 to 1149.

In addition to that, she had drawn many thousands of dollars in groceries and supplies of merchandise, all of which was charged to her account as executrix and paid for out of the funds of the estate, and were all improper as charges against the estate.

See "Exhibit C" to J. C. Neely's first deposition, Record pp. 686 to 694.

And she has never shown how it was used, and not being accounted for, we must assume that she used it for her individual benefit.

So we insist, that we can count out of the question the draft on the Southern Life Insurance Company deposited with Brooks, Neely & Co. by J. C. Palmer, her attorney, as offset by payment on her property January 15, 1875. And it still leaves the net proceeds of the cotton crop of

1874 the same as before stated, and both of the McCauley notes absolutely paid off out of the same, and charged to that account, and after all that, and all the drawing she had done against that fund, we find about April 13, 1875, at the close of the accounts, there was still due to her as executrix on the same, over eight hundred dollars.

See J. C. Neely's second deposition, Record p. 1116.
Also, see whole deposition, Record pp. 1107 to 1140 and 1163.

Again, besides the $42,621.59, proceeds of the cotton crop of 1874, the executrix collected $2235 from Felix Lanier (by the way, which she never accounted for in any of her settlements), (see F. R. Lanier's dep., Record 1066 to 1072; also exhibit to F. R. Lanier's first dep., Record 804), which make a total collection so far as we have found of $44,856.59 in money.

Now it will be interesting to know how she pretends to account for this money. By her first annual settlement in the Probate Court of Mississippi county she cuts the cotton receipts over half in two and reports $20,764.91 instead of $42,621.59. In her first annual settlement she reports having paid debts, including $805.25, lawyers' fees for collecting the life policies which went to her, a total of $3781.19.

Exhibit M. 1 to John Mathews dep., Record 1276.

In her *second* settlement, made in 1878, excluding lawyer's fees for fighting creditors and the salary of her agent John Mathews, she only reports having paid $3816.39, making by simple calculation, total debts paid by her of the estate proper $7597.58, and including $6300 paid as lawyer's fees and to John Mathews, agent, which makes the grand total of $13,897.55 that she has ever paid out in the admin-

istration of the estate according to her own showing, (see Exhibit M. 8 to Mathews' dep., Record 1283,) which would leave a net balance of cash in her hands unaccounted for from the above sources $39,979.04. Now deduct from that $10,000 paid on the two McCauley notes and $8000 in payment on the Hazard note, total $18,000, and it leaves a total in her hands of cash from the above items alone, not including rents and profits of the planting interests and money collected from other sources $12,979.64, and deduct from that her dower interest, as claimed in her first settlement (Record 1276), $6921.64, it still leaves in her hands unaccounted for, after paying all the debts which she ever claims to have paid, her individual lawyer's fees and expenses and deducting her dower as claimed by her $5058, and this according to her own showing. And in the above we do not count in $1280 settled with John Mathews as receiver in the Lanier transaction and not reported.

Hence we maintain that the proof conclusively shows that at the time the McCauley and Hazard notes were claimed to have been bought they were paid off out of the funds of the estate, she never using a single dollar of her individual money to pay them off, nor can a trustee pay his own money in the purchase of such notes out of one pocket whilst he has *trust funds in the other, which he has never accounted for*, and claim a benefit therein.

B.

As a result of the whole, we insist that all three of the notes were paid by the executrix with the money of the estate, and having come into her hands as executrix, they were thereby extinguished, for if these notes were not extinguished and paid off this case presents the remark-

able feature of an executrix and trustee with over thirty-five thousand dollars of the trust funds in her hands, purchasing in the claims against the estate and enforcing them for her own benefit and not accounting for a dollar of the trust funds. Now, if we are correct as to the result of the facts that these notes were taken up with the assets of the estate or even by her own money, when she had money of the estate in her own hands sufficient to pay them off, and for which she has never accounted, then the line of authorities cited by adversary counsel on page 12 of the brief, to-wit: Williams on Executors, Sixth American Edition, page 1973; 10 Pickering, 78; 16 Massachusetts, 227; 23 Arkansas, 116, and Trimble v. James, manuscript opinion referred to, can have no application in this case or controlling effect.

Again, the complainant Nancy A., executrix and trustee, will not be permitted under the law to trade or speculate in the property or funds of said estate, nor to purchase for speculation or otherwise the claims against said estate for her individual benefit, and such transactions are void. So far as any benefit to her is concerned, it will operate as an extinguishment, and inure to the benefit of the trust estate, and particularly is this so when she had money of the estate in her hands sufficient to pay off said claims.

Payne v. Hamilton, 29 Arkansas, page 507, and authorities cited.

Edwards on Notes and Bills, page 244.

C.

But on another ground, we submit that the complainant Nancy A. Edrington cannot hold the McCauley and Hazard notes individually, because she was one of the parties

who joined in the trust deed with her husband J. H. Edrington to J. W. Jefferson as trustee to secure the creditors therein named, which deed contains covenants of general warranty *against incumbrance*, etc.

And in addition to this at the time of its execution she was present when her husband, J. H., represented to the creditors that the Whitmore plantation was free from incumbrances, and that all the purchase money on the Fain place was paid off with the exception of one note, and that he would arrange and release it in a short time, and also joined in those representations and upon which the creditors acted, (see J. W. Jefferson's dep., Record 641 to 644,) and under these facts the complainant, Nancy A., is estopped as to the notes, both by the recitals in the trust deed and by her oral representations at the time of the trade. Although a married woman at the time she has estopped herself to deny the truth of her representations, because under the circumstances to hold otherwise would be to allow her to take advantage of her own tortious act and fraud.

Bigelow on Estoppel, page 445 and 446.
Carpenter v. Carpenter, 10 C. E. Green 194.
Schwarz v. Saunders, 46 Illinois 18.
3 Bush 702. 8 B. Monroe 539. 30 Alabama 382.
McCullough v. Wilson, 21 Penn. Stat. 436.

Again, although no personal liability might have been enforced against the complainant Nancy A. as a married woman on account of her covenants and recitals in the trust deed, yet she is bound thereby as well as all persons claiming by, through or under her.

Shoemaker v. Johnson, 35 Indiana 33.
VanRensselaer v. Kerney, 11 Howard 297-325.

III.

We also maintain that the action of the court was correct in refusing the petition for "Intervention" of John B. Driver, administrator de bonis non, and John Shedden, who claimed to be a general creditor.

First, because said petition if otherwise meritorious came too late. October the 4th, 1879, at the October term, 1879, this cause was tried on its merits and a *final* decree made, adjudging all the questions and settling the rights of all the parties, also decreeing a foreclosure of the trust deed from Edrington and wife to John W. Jefferson, trustee, ordering a sale of the *Whitmore* and *Fain* plantations, fixing the amount due to each and every of beneficiaries under said trust deed, and appropriating the fund in court and in hands of the receiver, collected as rents from said two plantations, as well as proceeds of sale when made, and distributing it pro rata among the complainants in cross-bill and other beneficiaries under said trust deed.

Record pages 1013 to 1022.

January 3, 1880, order directing master to receive receipts of beneficiaries to extent of pro rata in lieu of cash. R. 1023.

At the next term, March 8, 1880, the report of the master showing sale and distribution and payment to the beneficiaries of the entire fund, *was confirmed by decree*, divesting and vesting title in the purchasers.

Record pages 1024 to 1034.

After this, on March 9, 1880, the petition of John B. Driver, administrator *de bonis non*, and John Shedden, who claimed to be a general creditor of Edrington deceased to

the amount of $1,199.69 was filed, asking leave to *intervene*, setting up, that *January* 28, 1880, Nancy A. had filed her settlement, showing $28,973.35 due her, and making that pretended settlement part of the petition. R. 1035 to 1040. This exhibit, which was *made part of the petition, shows that petitioner had long before been paid off in full, and that the estate did not owe him a cent.*

See exhibit, R. 1050.

This petition, remarkable as it is, as shown by the exhibit, was filed by the counsel of Mrs. Edrington in this cause.

So it is evident that this petition, although *contradictory* of the former pleadings and position of Nancy A. on the record, was *filed* with her approval and in her interest. Upon motion of *complainants* in cross-bill, for the causes shown, said petition was stricken from the files.

Record 1053 to 1057.

Second, Because the petitioner John B. Driver, administrator de bonis non, *cum testamento annexo*, (R. 1041) *is in privity* with the former executrix Nancy A., and must stand or fall by her litigation about this matter.

1 Williams on Exr. (6th ed.) p. 528, note.

Stacy v. Thrasher, 6 How. p. 596.

Hill v. Tucker, 13 How. p. 467.

Third, No right of *intervention* exists in a case like this. "No such practice known in equity as making a person a defendant on his own application, without the consent of the complainant."

Stretch v. Stretch, 2 Tenn. Ch. 140.

When third person claims under, *or* in privity with one of the parties litigant, he must come in by *supplemental* bill.

Story's Eq. Pl. § 156.

It *cannot* be done by petition.

Foster v. Deacon, 6 Madd. 59.

Carow v. Mowatt, 2 Edw. 9.

Stretch v. Stretch, 2 Tenn. Ch. 141.

Fourth, Nor does the right of subrogation exist on behalf of petitioners.

Shelden on Sub. § 44.

Dixon on Sub. p. 155.

Storr v. Ellis, 6 John. Ch. 396.

See Lindsey v. Pivy, 30 Ark. 44.

Again, anyone who seeks to be protected by the application of the equitable doctrine of subrogation, *must* come into court with clean hands.

Shelden on Sub. § 44.

And the petition, on its face, in connection with the exhibit thereto, shows *positive* fraud, because it shows that the estate did not owe Shedden one cent. R. 1050.

For the above reasons, we submit that the decree should be affirmed.

Respectfully, D. E. MYERS,
WM. M. SNEED.